United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Orig w/affidavit of mailing

76-6158

To be argued by
DAVID W. MCMORROW

United States Court of Appeals

FOR THE SECOND CIRCUIT

B
P/S

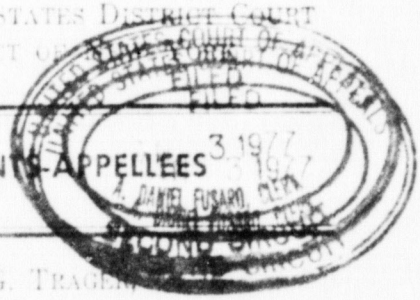
Docket No. 76-6158

WILLIAM DAVIS MARTIN,
Plaintiff-Appellant,

—*against*—

JOHN W. WARNER, Secretary of the Navy, and ADMIRAL D. W. COOPER, Chief of the Naval Reserve, Department of the Navy,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



BRIEF FOR DEFENDANTS-APPELLEES

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Preliminary Statement

This is an appeal from a final judgment of the United States District Court for the Eastern District of New York (Platt, *J.*) entered on September 22, 1976, granting defendants-appellees' motion for summary judgment dismissing plaintiff-appellant's amended complaint and denying plaintiff-appellant's motion for summary judgment directing that he be promoted to the rank of captain in the United States Naval Reserve retroactive to July 1, 1974 (A3).[1]

[1] References preceded by the letter "A" are to pages in the Joint Appendix.

Issue Presented

Was the district court correct in finding that appellant was not entitled to judgment directing that he be retroactively promoted to the rank of captain in the United States Naval Reserve?

Statement of the Case

The relevant material facts are not in issue. On February 12, 1974, appellant, then on active duty as a commander in the United States Naval Reserve, was recommended for promotion to the rank of captain in the Naval Reserve by a selection board convened by the Secretary of the Navy (hereinafter the "Secretary").[2] On February 15, 1974, the report of the selection board recommending appellant's promotion was approved by the Secretary, acting for the President (A21, A34). On April 24, 1974, the United States Senate, acting

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[2] Promotion procedures for Naval Reserve officers in active service are labyrinthine. *See generally* 10 U.S.C. §§ 5891 *et seq.* The names of all officers on active duty are maintained by the Secretary on a single lineal list. 10 U.S.C. §§ 5504. For promotion purposes each officer in active service in the Naval Reserve has a so-called "running mate," who generally is the person on the lineal list next junior to the officer. 10 U.S.C. § 5665. An officer must complete a specified number of years of service in a particular grade before he becomes eligible for consideration for promotion to the next higher grade. 10 U.S.C. § 5751. Eligible Naval Reserve officers are reviewed for promotion by a selection board convened by the Secretary. 10 U.S.C. § 5893. When he convenes a selection board, the Secretary establishes a "promotion zone" composed of the number of officers which the Secretary determines are eligible for selection for promotion to the next higher grade. 10 U.S.C. § 5764. Reserve officers become eligible for promotion when their "running mates" are in the promotion zone. 10 U.S.C. § 5899.

pursuant to 10 U.S.C. § 5912,[3] confirmed appellant's "temporary" appointment to the rank of captain (A21).[4]

On May 3, 1974, appellant ran nude through the Belmont Hotel Ballroom in New York City in the presence of a group of Naval Reservists and their spouses. The Chief of the Naval Reserve ordered an informal investigation of the incident. On June 28, 1974, the Secretary, acting pursuant to 10 U.S.C. § 5902(d),[5] authorized the Chief of Naval Personnel to take no action

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[3] 10 U.S.C. § 5912: "Permanent and temporary appointments under this chapter in grades above lieutenant-commander in the Naval Reserve and in grades above major in the Marine Corps Reserve shall be made by the President, by and with the advice and consent of the Senate. All other permanent and temporary appointments under this chapter shall be made by the President alone."

[4] Promotions may be permanent or temporary, depending upon a rather complicated determination of the current distribution of officers. See explanatory note under 10 U.S.C. § 5778. Those receiving temporary promotions may subsequently obtain a permanent promotion. In the Naval Reserve the number of officers on active duty in each grade who may be permanently promoted to the next higher grade is limited by law to a specified percentage of the total authorized number of such officers. 10 U.S.C. § 5457. Moreover, an officer in the Naval Reserve is permanently appointed in a grade in the Naval Reserve only when ". . . the most junior of those male line officers on the active list who are senior to him is permanently appointed in that grade in the Regular Navy." 10 U.S.C. § 5783(a).

[5] 10 U.S.C. § 5902(d): "The promotion of an officer of the Naval Reserve or the Marine Corps Reserve who is under investigation or against whom proceedings of a court-martial or a board of officers are pending may be delayed by the Secretary of the Navy until the investigation or proceedings are completed. However, the promotion of an officer may not be delayed under this subsection for more than one year after the date he is selected for promotion unless the Secretary determines that a further delay is necessary in the public interest."

with regard to the temporary promotion of appellant to the rank of captain, pending the results of the investigation of the incident. On November 12, 1974, appellant's name was removed from the promotion list by the Secretary, acting for the President, pursuant to 10 U.S.C. § 5905(a) (A19-A20).[6] In July 1975, appellant retired from the Naval Reserve at the rank of commander.

Appellant originally commenced this action in an attempt, ultimately unsuccessful, to enjoin the informal investigation initiated by the Chief of the Naval Reserve. The district court's opinion denying the injunction is reported at 377 F. Supp. 1039 (E.D.N.Y. 1974).[7]

In March 1975, appellant filed an amended complaint herein, followed by a motion for summary judgment, seeking a judgment directing that he be retroactively promoted to the rank of captain in the Naval Reserve. Appellant based his claim on the contention that only the President of the United States had the authority to remove him from the promotion list under 10 U.S.C. § 5905(a) and that therefore the action of the secretary in removing him from the list was unlawful. Appellant argued that the Secretary was only authorized to delay appellant's promotion until the investigation was completed, which he contends was July 10, 1974, and that appellant should be deemed to have been promoted to the rank of captain as of that date.

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[6] 10 U.S.C. § 5905(a): "The President may remove the name of any reserve officer from a promotional list established under this chapter."

[7] Appellant made a motion in this Court to stay his retirement at the rank of commander pending appeal of the district court decision. The motion was denied on July 5, 1975, and it does not appear that an appeal was taken by appellant from the original district court order denying the injunction.

Appellees moved for summary judgment in their favor on the grounds that, in removing appellant's name from the promotion list, the Secretary had acted lawfully pursuant to an implied delegation of Presidential authority.

In granting appellees' motion, the district court rejected their "implied delegated authority" argument and concluded instead, that the President's failure to complete appellant's "temporary" appointment by preparing and signing his commission "was the equivalent of, or tantamount to," an affirmative removal by the President of appellant's name from the promotion list.

Appellees submit that the result reached by the district court is correct and that it can be supported either by the reasoning of the court or, perhaps even more strongly, by the "implied delegated authority" argument which the district court rejected.

ARGUMENT

POINT I

The district court correctly concluded that the president's failure to prepare and sign appellant's commission constituted an affirmative removal of appellant's name from the promotion list.

The district court did not perceive the pivotal issue in this case as being whether the Secretary, acting for the President, was authorized to remove appellant's name from the promotion list. Rather, it found that in the final analysis, appellant's position was that following the completion of the investigation by the Secretary, the President failed to complete appellant's temporary ap-

pointment by preparing and signing appellant's commission (A7). The court noted that appellant's promotion was terminable at any time or revocable at will by the President, that the President was under no obligation to prepare and sign appellant's commission, and that the President's ". . . failure to do so in this instance may be said to be the equivalent of, or tantamount to, an affirmative removal by him of plaintiff's name from the promotion list under 10 U.S.C. § 5905(a)" (A8). Appellant contends that he assumed the temporary rank of captain when the investigation was allegedly completed on July 10, 1974, notwithstanding the President's failure to sign and prepare a commission actually appointing him. Appellees submit that the district court's decision is correct.

Congress has expressly provided that, "[a]ll permanent and temporary appointments . . . in grades above lieutenant commander in the Naval Reserve . . . should be made by the President, by and with the advice and consent of the Senate." 10 U.S.C. § 5912. It is not disputed that appellant was appointed to the "temporary" rank of captain in the Naval Reserve by the Secretary, acting for the President, and that this appointment was confirmed by the Senate. However, it is also not disputed that the President, acting alone or through the Secretary, never prepared and signed a commission appointing appellant to the "temporary" or permanent rank of captain. Appellant's temporary appointment to captain could not have taken effect until a commission actually appointing him to that rank had been prepared, signed and delivered. *See* 10 U.S.C. § 5912. *See also D'Arco* v. *United States*, 441 F.2d 1173 (Ct. Cl. 1971).

The district court was absolutely correct when it stated that ". . . there is not even a possible argument

that the President had any obligation to complete the plaintiff's [appellant's] appointment by preparing and signing his commission." In *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), the Supreme Court held that an executive was not required to complete an appointment by preparing and signing a commission where the appointment was revocable at will.

It is beyond peradventure that appellant's temporary appointment was revocable at will. The President is expressly empowered to remove the name of any officer, reserve or otherwise, from a promotion list. 10 U.S.C. §§ 5777(a) and 5905(a). Appellant was on the list for promotion to the "temporary" rank of captain. Moreover, even if he had actually received a commission in the "temporary" rank of captain, appellant would still be on the list for promotion to the "permanent" rank of captain. See 10 U.S.C. §§ 5902 and 5905. Hence, appellant was at all relevant times subject to having his name removed from the promotion list for captain. Since appellant's appointment to the rank of captain could therefore be revoked at will, the President, acting alone or through the Secretary, was under no obligation whatsoever to issue either a temporary or permanent commission to appellant.

The fact that the Senate had already confirmed appellant's temporary appointment and that the Secretary, acting for the President, customarily prepares and signs commissions, is irrelevant. The determinative facts are that the President, either acting alone or through the Secretary, did not prepare and issue a commission to appellant and that appellant retired at the rank of commander, having never assumed the rank of captain.

The Court of Claims, in *D'Arco* v. *United States*, *supra*, 441 F.2d 1173 (Ct. Cl. 1971), recently addressed sub-

stantially the same issue posed in this case. In *D'Arco* the plaintiff, a captain in the Marine Corps, was selected for a temporary appointment to the rank of major. A so-called "interim" or "recess" appointment (an appointment which may be issued prior to Senate confirmation) was forwarded to D'Arco, but was returned to Marine Corps headquarters by D'Arco's superiors because D'Arco was then under investigation. Shortly thereafter the Senate confirmed D'Arco's temporary appointment. Three months following Senate confirmation, the Secretary removed D'Arco's name from the promotion list. D'Arco argued that the Secretary had no power to withhold the signed interim appointment and to remove his name from the promotion list after Senate confirmation, citing *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803). The Court of Claims disagreed and held that the appointment could be withheld and D'Arco's name removed from the promotion list. The court pointed out the distinction made in *Marbury* between offices held for certain terms or periods and offices held at the will of the Chief Executive. In the former case, an appointment is not revocable, but in the latter ". . . the circumstance which complete his appointment is of no concern, because the act is at any time revocable." *D'Arco* v. *United States*, 441 F.2d at 1175, *quoting from Marbury* v. *Madison*, 5 U.S. (1 Cranch) at 162. Since D'Arco's temporary appointment to major was, like appellant's pending temporary appointment to captain, terminable at will, the Secretary, acting for the President, could validly refuse to make the appointment.

With respect to plaintiff D'Arco's argument that the Secretary was not empowered to withhold his commission and remove his name from the promotion list subsequent to Senate confirmation, the Court stated:

> It follows *a fortiori* that plaintiff was likewise not promoted when or after the Senate confirmed the

> nomination in February 1965. No commission was thereafter prepared, signed, or issued. Chief Justice Marshall's reasoning teaches that, even if the office had been for a term of years, like Marbury's, the executive could still refuse to complete the appointment, after Senate confirmation, by failing to prepare or sign the commission. [Citations omitted.] Since the office here was not of that kind, but was revocable at will, the Secretary (acting for the President) plainly had no less authority. Indeed, the statutes specifically provide that the President "may remove the name of any officer from a promotion list." 10 U.S.C. § 5777(a) (1964). This implies that he (and the Secretary for him) may do so at any time before the appointment is consummated.
>
> *D'Arco* v. *United States*, 441 F.2d at 1175.

The same result is dictated in appellant's case. The President is not obligated to deliver a "temporary" commission to appellant. His failure to do so has the result of preventing appellant from assuming the "temporary" rank of captain. Thus, appellant retired from the Naval Reserve at the rank of commander and is not entitled to any form of affirmative relief requiring that he be retroactively appointed to the rank of captain.

POINT II

The Secretary of the Navy lawfully acted pursuant to an implied delegation of Presidential authority in removing appellant's name from the promotion list.

The district court concluded that the authority of the President under 10 U.S.C. § 5905(a) to remove appellant from the promotion list had not been delegated to the Secretary by either Congress or the President. The sole basis for the court's conclusion was that while the President had delegated certain of his prescribed authority under Title 10 of the United States Code, he had not specifically delegated his authority under 10 U.S.C. § 5905(a). Appellees submit that the district court's conclusion is incorrect.

A delegation of the President's authority may be express or implied. Congress has authorized the President to designate and empower the head of any department or agency to perform any function vested in the President by law except where such delegation is specifically prohibited. 3 U.S.C. §§ 302 and 301. However, at the same time Congress has recognized the propriety of "implied" or "presumed" delegation of Presidential authority:

> This chapter shall not be deemed to limit or derogate from any existing or inherent right of the President to delegate the performance of functions vested in him by law, and *nothing herein shall be deemed to require express authorization in any case in which such an official would be presumed in law to have acted by authority or direction of the President.* 3 U.S.C. § 302 (emphasis added).

The United States Supreme Court expressly confronted the issue of an implied delegation of Presidential

authority in *Wilcox* v. *Jackson*, 38 U.S. (13 Pet.) 498 (1839). A federal statute exempted from sale all lands reserved from sale "by order of the President." A reservation was made by the Secretary of War and, subsequently, a jurisdictional dispute arose. The Court held that the approbation and direction of the President was to be presumed and that the reservation was made by the President within the meaning of the Act. "The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties. . . . [T]he act of the War Department . . . [is] in legal contemplation the act of the President; and, consequently, the reservation thus made was in legal effect, a reservation made by order of the President. . . ." *Ibid*, 38 U.S. (13 Pet.) at 513. In *accord*, *United States* v. *Eliason*, 41 U.S. (16 Pet.) 291, 302 (1842); *United States* v. *Clarke* (*The Confiscation Cases*), 87 U.S. (20 Wall) 92, 109 (1873); *United States* v. *Farden*, 99 U.S. 10, 19 (1879); *Wosley* v. *Chapman*, 101 U.S. 755, 769 (1879); *see also*, *Parker* v. *United States*, 26 U.S. (1 Pet.) 293, 297 (1828).

The Supreme Court also held, in *Denby* v. *Berry*, 263 U.S. 29, 33 (1923), that the Secretary of the Navy serves as the "alter ego" of the President and therefore was authorized to act on his behalf in carrying out certain personnel changes in the Naval Reserve. Two years later, in the landmark decision of *Myers* v. *United States*, 272 U.S. 52 (1925), the Supreme Court expanded on the "alter ego" concept in rejecting the argument that the heads of executive departments "are not his [the President's] servants to do his will":

> The highest and most important duties which his [the President's] subordinates perform are those in which they act for him. In such cases they are exercising not their own but his discretion. . . .

> Each head of a department is and must be the President's alter ego in the matters of the department where the President is required by law to exercise authority.

Myers v. *United States*, 272 U.S. at 132-133.

And, in *Maresca* v. *United States*, 277 F. 727 (2d Cir. 1921), this court upheld the validity of regulations promulgated by the Commissioner of Internal Revenue under a statute which provided "that under such rules, regulations and bonds as the President might prescribe" certain acts might or might not be permitted. Willful violation of any such rule or regulation subjected the violator to criminal sanctions. In *Maresca*, this Court acknowledged that "[t]he law is established that the President may exercise through the heads of departments the power vested in him. He speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties." *Maresca* v. *United States*, *supra*, 277 F. at 739. *See also*, *Roxford Knitting Co.* v. *Moore & Tierney*, 265 F. 177 (2d Cir.), *cert. denied*, 253 U.S. 498 (1920); *Wirtz* v. *Atlantic States Construction Company*, 357 F.2d 442 (5th Cir. 1966); *United States* v. *McIntosh*, 2 F. Supp. 244 (E.D. Va. 1932), *aff'd*, 70 F.2d 507 (4th Cir. 1934), *cert. denied*, 293 U.S. 586 (1934); *Porter* v. *Coble*, 246 Fed. 244 (8th Cir. 1917); *May* v. *United States*, 236 F. 495 (8th Cir. 1916); *In Re Brodie*, 128 F. 665 (8th Cir. 1904); *United States* v. *Cutter*, 25 Fed. Cas. 740 (D.N.H. 1856).

Finally, the Court of Claims has upheld, on at least two occasions, the authority of military department heads to remove or vacate temporary appointments. In *D'Arco* v. *United States*, 441 F.2d 1173 (Ct. Cl. 1971), discussed in Point I, *supra* at pages 7-9, the Court of

Claims held that the Secretary of the Navy lawfully acted for the President when he withheld D'Arco's commission. As indicated in the passage from the court's opinion quoted in Point I, *supra* at pages 8-9, the court concluded that the Secretary, "acting for the President," was authorized to withhold D'Arco's commission and to remove his name from the promotion list.

In an earlier decision, *Brownsfield* v. *United States*, 148 Ct. Cl. 411 (1960), the Court of Claims held that the authority vested in the President to vacate temporary military appointments could be exercised by the secretary of the department involved. The court stated that it would give legal effect to certain acts of the secretary as if they were the personal actions of the President, on the well-settled theory that the act of the head of an executive department is the presumptive act of the President. *See also Seltzer* v. *United States*, 98 Ct. Cl. 554 (1943); *Adams* v. *United States*, 42 Ct. Cl. 191 (1907); *Weller* v. *United States*, 41 Ct. Cl. 324 (1906); *Hayden* v. *United States*, 38 Ct. Cl. 39 (1903); *Cf. Ruderer* v. *United States*, 412 F.2d 1285, 188 Ct. Cl. 456 (1969); *Huling* v. *United States*, 401 F.2d 998, 185 Ct. Cl. 407 (1968); *Norman* v. *United States*, 392 F.2d 255, 4 Op. *Att'y Gen.* 217 (1843); 12 Op. *Att'y Gen.* 32, 43 (1866).

Appellees submit that in the instant case the Secretary, in removing appellant's name from the promotion list, "would be presumed in law to have acted by authority or direction of the President . . ." within the meaning of 3 U.S.C. § 302 and to have acted in a manner fully sanctioned by applicable case law.

There is no doubt that the Secretary of the Navy is the head of the appropriate department. "There is a Secretary of the Navy, who is the head of the Depart-

ment of the Navy." 10 U.S.C. § 5031(a). In matters dealing with the Department of the Navy, the Secretary is the representative of the President and he "exercises his [the President's] power on the subject confided to his Department." *United States* v. *Jones*, 59 U.S. (18 How.) 92 (1855). *See also Wolsey* v. *Chapman*, 101 U.S. 755 (1879) (in which the Commissioner of the General Land Office, acting for the Secretary of the Treasury, was held to be the proper representative of the President); *D'Arco* v. *United States*, 441 F.2d 1173 (Ct. Cl. 1971); *Brownfield* v. *United States*, 148 Ct. Cl. 411 (1960).

Appellees recognize that there is a narrow exception to the general rule that "the heads of departments are [the President's] authorized assistants in the performance of his executive duties, and their official acts, promulgated in the regular course of business, are presumptively his acts." *Runkle* v. *United States*, 122 U.S. 543, 557 (1887). When Congress specifically places limits on the authority of the President to delegate his duties, they may not be further delegated. Thus, where an Article of War stated that the sentence of a general court-martial to the effect that a commissioned officer be dismissed from the service would be inoperative until "*laid before* the President of the United States for his confirmation or disapproval and orders in the case," the Supreme Court held that the President, personally, had to act. *Runkle* v. *United States*, *supra*, 122 U.S. 543.[8] Similarly, where a statute specifically limited the power to authorize a wiretap application to "the Attorney General or any

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[8] *Runkle* appears to be the first case which held that Presidential authority may be non-delegable. However, the holding in *Runkle* was later minimized by the Supreme Court in *United States* v. *Fletcher*, 140 U.S. 84, 90 (1893) ("Reference to the report of that case [*Runkle*] shows that the circumstances were so exceptional as to render it hardly a safe precedent in any other").

Assistant Attorney General *specially designated* by the Attorney General," the Court held that Congress had expressly addressed "the matter of delegation". *United States* v. *Giordano*, 416 U.S. 505 (1974) (Emphasis added). It should also be noted that both of these cases, in addition to specifically limiting the effect of the decision to cases where Congress specifically addressed the issue of delegability, involved an executive officer performing a judicial act in the field of criminal justice.

Unlike the two cases stating the exception to the general rule, the instant case involves *no* statutory language prohibiting delegation. Indeed, it would appear to fall squarely within the holdings of numerous decisions which have applied the rule of implied delegation in the context of statutes reposing authority in the office of the President. *See* the United States Supreme Court decisions cited on page 11, *supra*. *See also Chicago, M & St. P.R. R.* v. *United States*, 244 U.S. 351, 357 (1961); *United States* v. *Morrison*, 240 U.S. 192, 212 (1916). *Cf. Cunningham* v. *Neagle*, 135 U.S. 1, 64 (1890).

The district court's conclusion that the Secretary did not have an implied delegation of authority under 10 U.S.C. § 5905(a) to remove appellant's name from the promotion list is not supported by the exceptions to the implied delegation rule recognized in *Runkle* and *Giordano*. The court observed that the President, acting pursuant to 3 U.S.C. § 301, had by executive order delegated certain of his authority under Title 10 of the United States Code but had not so delegated his authority under 10 U.S.C. § 5905(a).[9] The court thus concluded that

[9] The district court pointed to the express delegations of authority in Executive Orders Nos. 10621, 10661 and 11390, found in West's Supplementary Pamphlet, U.S.C.A. Title 1 to 4, at pp. 394, 397, 398 and 402.

this "would clearly seem to indicate that the Secretary had no such implied delegated authority and that neither Congress nor the President had made any such delegation expressly or by implication" (A7).

There is no basis whatsoever for concluding that Congress did not intend for the doctrine of implied delegation of authority, sanctioned in 3 U.S.C. § 302, to be applicable to 10 U.S.C. § 5905(a). As far as Presidential "intent" is concerned, it is pure unsupported speculation to conclude that the President, in delegating some of his numerous functions under Title 10, thereby evidenced a desire to retain for himself all other functions delegated to him. Indeed, it strains the imagination to conclude that the President desires to personally exercise the myriad of functions presently exercised by department heads pursuant to an implied delegation of authority. Thus, the action of the President in delegating certain of his functions in no way forcloses the application of the doctrine of implied delegation of authority with respect to the other functions. The doctrine is only inapplicable where Congress has forbidden delegation.

Appellant was, in 1974, an officer in the Naval Reserve holding an appointment in the rank of commander. Like D'Arco, his temporary appointment to the next highest rank would have been terminable at any time, notwithstanding Senate confirmation of the appointment. 10 U.S.C. § 5779. *See also Myers* v. *United States*, 272 U.S. 52 (1926). Unlike D'Arco, appellant was never the subject of an interim signed commission (delivered or undelivered). It follows that if the Secretary could remove D'Arco's name from the promotion list he could certainly remove the appellant's name.

Appellant places substantial reliance on the argument that under 10 U.S.C. § 5902(d) the Secretary has only

been delegated the power to delay promotions for one year and has not been delegated the authority to remove appointees from the promotion list.[10] Appellant's argument assumes that this statutory grant of authority somehow forecloses the Secretary from exercising an implied delegation of authority. It is clear, however, that Congress did not intend to so limit the authority of the Secretary.

The Secretary of the Navy is expressly authorized to delay the promotion of an officer of the Naval Reserve or the Marine Corps Reserve ". . . who is under investigation or against whom proceedings of a court-martial or a board of officers are pending . . ." 10 U.S.C. § 5902(d). This part of the statute is identical to authority vested in the Secretary of the Army under 10 U.S.C. § 3363(e). The legislative history of this latter statute reveals that it was enacted to conform Reserve promotion procedures with those utilized with Regular officers. House Report No. 904, 84th Cong., 1st Sess. (1955).

> The purpose of this provision is a protection for the reservist himself, if he is under investigation or awaiting court-martial. In the past we had had the problem where he comes up to the period where he must be promoted or removed from the

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[10] 10 U.S.C. § 5902(d):

> The promotion of an officer of the Naval Reserve or the Marine Corps Reserve who is under investigation or against whom proceedings of a court-martial or a board of officers are pending may be delayed by the Secretary of the Navy until the investigation or proceedings are completed. However, the promotion of an officer may not be delayed under this subsection for more than one year after the date he is selected for promotion unless the Secretary determines that a further delay is necessary in the public interest.

> recommended list. If he is removed from the recommended list, this is a rather drastic thing because it is the same thing as a passover. If he comes up the next time and fails a promotion, he is twice passed over.

Hearings on H.R. 5083 and 7325 Before a Subcommittee of the House Committee on Armed Services, 86th Cong. 1st Sess. 2430-2431 (1950). The self-evident purpose of the statute was not to limit the authority of the Secretary, but to harmonize Reserve and Regular officer promotion procedures and to provide a fair basis to suspend the promotion of one who is under investigation, short of a definite removal from the list.[11]

Clearly, the temporary removal authority of 10 U.S.C. § 5902(d) is in no manner a limitation on the Secretary's power to permanently remove a name from the promotion list under § 5905(a). To the contrary, one of the purposes behind the enactment of § 5902(d) was

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[11] One further qualification appears in § 5902(d), which is not contained in the Army's equivalent: delays so authorized shall not exceed ". . . one year after the date he is selected for promotion unless the Secretary determines that a further delay is necessary in the public interest." The Senate Report contains the following comment on this provision:

> In order that this delay will not continue for an inordinate length of time, it is provided that it can continue no longer than one year except by the Secretary himself.

Senate Report No. 1613, 86th Cong., 2nd Sess., *reprinted in* 1960 *United States Code Congressional and Administrative News* 2497, 2526.

This passage suggests that Congress intended the public interest determinations necessary to warrant a delay in excess of one year to be nondelegable and to be made by the Secretary personally. In the present case the Secretary's action pursuant to 10 U.S.C. § 5902 was taken on June 28, 1974, and lasted only until November 12, 1974, when plaintiff's name was removed from the list.

to benefit or protect officers who are under investigation with an interim removal that would not have the adverse impact of a promotion passover. Where, as here, the Secretary determines to act further under § 5905(a), his prior action in temporarily removing plaintiff's name from the list is of absolutely no consequence. The Secretary is personally clothed with authority pursuant to § 5902(d); his authority pursuant to § 5905(a) is delegated. In the latter instance, he is presumed in law to have acted "for the President."

Finally, and perhaps most importantly, it should be noted that there is an inherent, and perhaps fatal, flaw in appellant's strenuous argument that the power to appoint officers under 10 U.S.C. § 5902 is vested in the President with the advice and consent of the Senate and that only the President could act to either appoint an officer or remove his name from a promotion list. [Appellant's Brief at 11]. Appellant's argument overlooks the fact that the decision to promote appellant to the rank of captain in the first place was made by the Secretary, acting for the President. The President's authority to appoint officers, like his authority to remove names from promotion lists, has not been expressly delegated to the Secretary. It is inherently contradictory for appellant to conclude that the Secretary is authorized to promote appellant to captain (such a conclusion is implicit in appellant's contention that he should be retroactively promoted to captain) while arguing, at the same time, that the Secretary was not authorized to remove appellant's name from the promotion list. Both acts would appear to be grounded in the same implied delegation of presidential authority.[12]

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[12] This same flaw taints the distinct court's reasoning. If the court is correct in its conclusion that powers which the President has not delegated to his subordinates may not be "presumed" or "implied", then the Secretary acted improperly in approving, for the President, appellant's promotion to captain in the first place.

CONCLUSION

For the reasons set forth herein the judgment of the United States District Court for the United States District Court for the Eastern District of New York in this action should be affirmed.

Dated: Brooklyn, New York
December 30, 1976

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

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Of Counsel.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN VALENTI, being duly sworn, says that on the 3rd day of January, 1977, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF FOR THE APPELLEE of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Ronald Podolsky, Esq.
15 Park Row
New York, N.Y. 10038

Evelyn Valenti

Sworn to before me this
3rd day of Jan. 1977

Carolyn M. Johnson

Notary Public, State of New York
No. [illegible]
Term expires March 30, 1977